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NO. 86-1279

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CINCINNATI FIREFIGHTERS UNION,
LOCAL UNION NO. 48
Petitioner

v.

TILFORD YOUNGBLOOD, et al.
and
JOHN W. DALZELL, et al.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS (PLAINTIFFS) IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Fourteenth Amendment permits race to serve as a basis for a preference for promotions in government service where the government employer has obligated itself by a consent decree to remedy underrepresentation of minorities within its workforce, where the results of a competitive examination for promotion within the workforce will produce almost no minority advancement, and where the remedy will not deny promotion to any nonminority.

PARTIES TO THE PROCEEDING

The parties to the proceedings before the Court of Appeals were: Cincinnati Firefighters Union, Local No. 48, Intervenor-Appellant; Tilford Youngblood and Ralph Nichols, Plaintiffs-Appellees and the class they represent; and John W. Dalzell, Harold Latimer, Arthur Hull, William Clark, Henry J. Sandman, and Bert A. Lugannani, Defendants-Appellees, all of whom were officials of the City of Cincinnati.

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Respondents, Tilford Youngblood, et al., respectfully pray that a writ of certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on November 7, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 804 F.2d 360, and is reprinted in Petitioner's Appendix A, pp. 1a-12a.

The memorandum decision of the United States District Court for the Southern District of Ohio is reported at 625 F.Supp. 30, and is reprinted in Petitioner's Appendix B., pp. 13a-24a, and its Order for Compliance in Petitioner's Appendix C at pp. 25a-28a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1986 and is reprinted in Petitioner's Appendix D, p. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

By statute in Ohio, fire department vacancies in positions above the rank of "regular fireman" must be filled by competitive promotional examinations. The relevant portions of the Ohio Revised Code (O.R.C. Sections 124.37, 124.45, 124.46, and 124.48) are set forth in Petitioner's Appendix E, pp. 31a-35a.

STATEMENT OF THE CASE

1. Statement of Facts

This class action was filed on March 20, 1973, on behalf of blacks who sought appointment as firefighters in the Division of Fire. The Complaint alleged that the Defendants, employees of the City of Cincinnati, were engaged in a pattern and practice of discrimination based upon race in recruiting, testing, selecting and hiring applicants for the position of fire recruit, and in the promotion of firefighters in the Division of Fire, in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983.

When this action was filed, blacks made up approximately one percent of the force (decision of District Court, 625 F. Supp. at 31, Pet. App. B, p.14a). There were *no* blacks in the promoted ranks. On May 7, 1974, the parties entered into a Consent Decree. The Petitioner-Union was not a party to the lawsuit at that time, and made no effort to intervene in the matter to object to the terms of the Decree. The Consent Decree provided for nondiscriminatory testing for hiring, and set a goal of increasing the percentage of blacks on the force to eighteen percent by 1980. That goal was not met by the City. In April, 1981, the Consent Decree was modified to give the City until the end of 1985 to meet the goal. (*Id.*)

The Decree also called for the use of affirmative action in promotions. Paragraph 27 provides that:

> "defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of a workforce composition which negates any inference of an unlawfully discriminatory promotion policy based on race."

On August 28 1984, a civil service examination was conducted by the City of Cincinnati for promotion to the rank of Fire Lieutenant. An eligibility list was posted on September 26, 1984. A total of 231 applicants passed the test, 36 of whom were black. However, the highest ranking black on the list was number 23, followed by blacks ranked numbers 42, 43, and 67. If promotions were made in rank order from the eligibility list it was unlikely that more than one black would be promoted from the two-year eligibility list (decision of District Court, 625 F.Supp. at 31; Pet. App. B, p. 15a). On March 11, 1985, Respondent-Plaintiffs filed a Motion for Enforcement of Consent Decree. The City had promoted 19 persons from the list at that time, all of whom were white. (*Id.*)

When the motion was filed, it was clear that the City would not reach its goal of 18 percent minority representation by the end of 1985, as required in the 1981 decree modification. Eleven years after the effective date of the Consent Decree, blacks made up less than 15 percent of the force. This was so even though the relevant labor force for the City of Cincinnati is approximately 33 percent black.

At the time Respondent-Plaintiffs filed the Motion for Enforcement it was also evident that blacks were seriously underrepresented in the promoted ranks in the Division of Fire. Accordingly, Respondent-Plaintiffs' Motion for Enforcement sought an order that certain positions would be double-filled as was done in this case pursuant to the District Court's 1982 Order for Compliance. Only three (or 2.2 percent) of 137 drivers were black. Of the 105 lieutenants, only five (or 4.7 percent) were black. There was only one black captain out of a total of 48. There were no black district chiefs or assistant chiefs (decision of District Court, 625 F.Supp. at 33; Pet.

App. B, p. 19a). The Council of the City of Cincinnati recognized that blacks were underrepresented by a Resolution on October 10, 1984, and expressed its continuing support for affirmative action promotions. (*Id.*)

2. The Proceedings Below

Respondents-Plaintiffs are in agreement with the Statement of Proceedings in Respondent-Defendants' Brief in Opposition.

ARGUMENT

In the case of *Wygant* v. *Jackson Board of Education*, ____ U.S. ____, 106 S.Ct. 1842 (1986), Justice O'Connor, concurring in the judgment, harmonized the various positions taken by the Justices to describe the Court's test for judging the constitutionality of race conscious affirmative action plans. The first part of the two part test concerned the factual basis, and in this regard Justice O'Connor said:

> [T]he Court is in agreement that [the] . . . remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.

Wygant, supra, 106 S.Ct. at 1853.

Once the required factual basis exists, a remedial plan must fit the problem to be addressed. As Justice O'Connor stated at 106 S.Ct. 1853-54:

> Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.

Respondents submit that the Court of Appeals correctly held that the enforcement order by the Trial Court clearly met this standard.

1. Although there was no contemporaneous finding of actual discrimination, there was a firm basis for believing that remedial action was required.

When this action was commenced in 1973, approximately one percent of Cincinnati Firefighters were black. None were in the promoted ranks. Although the consent decree contained a disclaimer of liability, it is manifest that there was a strong basis for believing that affirmative action was required.

Paragraph 27 of the Consent Decree requires the City to use affirmative action in promotions to "negate any inference of an unlawfully discriminatory promotion policy based upon race." When Respondent-Plaintiffs' Motion for Enforcement was filed, an inference of unlawfully discriminatory promotion policy clearly existed. It was an indisputable fact that blacks were seriously underrepresented in the promoted ranks, and that the results of the examination would do nothing to change this situation. In fact, it was anticipated that only

one black would be promoted during the life of the eligibility list if promotions were made in rank order.

Thus, there is no question that the Consent Decree required the City to engage in the use of affirmative action. The parties to the Consent Decree, Respondent-Plaintiffs and the City, both agree that the use of the double-fill plan approved by the Court is a proper interpretation of Paragraph 27 of the Decree. Indeed, the District Court determined that such relief was appropriate in its earlier 1982 Order for Compliance.

The Petitioners claim that the District Court, in its enforcement order, relied solely on the outcome of the 1984 promotional test. This is not accurate. The Court's finding of an inference of discrimination was based not only on the low placement of blacks on the test, but also on the continued underrepresentation of blacks, in the fire division as a whole, and especially in the promoted ranks.

2. The requirement of affirmative action in promotions consisting of double-filling of some positions does not unnecessarily trammel the rights of innocent individuals.

The Compliance Order does not "unnecessarily trammel" the interest of white firefighters. The plan simply calls for every sixth position to be double-filled with a black firefighter from the list of eligibles. No firefighter, black or white, will be denied a promotion to which they are entitled. No firefighter will be promoted later than they would otherwise be during the life of the eligibility list.

The Petitioner does not attempt to dispute these facts. Instead, it states that certain unidentified firefighters will suffer detriment that will not manifest itself until the cur-

rent Lieutenant's list expires in 1986, and a new eligibility list is posted some time in the future. According to the Petitioner, these unidentified members will be injured because their promotions will be delayed. The delay is attributed to the Court's Order for Compliance which provides that no vacancy shall occur upon the expiration of the eligibility list until all double-fills are absorbed into the complement.

The answer to the Petitioners' argument is all too simple and is stated by the Court of Appeals at 804 F.2d 363 (Pet. App. A, pp. 7a-8a):

> Since every vacancy during the life of each eligibility list was filled by appointing the highest ranked candidate from the list, there was no detriment to any ranked candidate during the life of the list. The expiration of each list meant that those whose names were on it were no longer eligible for promotion. All promotions after the expiration date would be made from a new list to be compiled on the basis of the scores achieved on a new promotion examination. The only change effected by the order for compliance related to the timing of a subsequent competitive exam following the expiration of an eligibility list.
>
> * * *
>
> Thus, the only detriment to any firefighter flowing from the order for compliance consisted of a delay in the time when he or she would become eligible to compete for promotion. No one was denied a promotion by operation of the absorption clause.

Moreover, the Petitioner erroneously assumes in its argument that the persons who will be at the top of the next promotion list will be white. Of course, there is

nothing to support that assumption. The only detriment to any firefighter, whether black or white, is delay in the time when he or she would become eligible to compete for promotion.

Firefighters Local No. 1784 v. *Stotts*, 467 U.S. 561 (1984) is inapplicable to this case. Here the Consent Decree and Compliance Order were voluntarily entered into by the City and Respondent-Plaintiffs. Further, as the Court of Appeals below noted at 804 F.2d 364 (Pet. App. A, p. 8a-9a):

> We agree with the appellees that *Stotts* is not controlling. In the present case the district court did not undertake to modify a consent decree by issuing an order concerning a matter on which the decree was silent. Rather, the court ordered compliance with a specific provision of the decree, the one related to a system of promotions. In addition, the order in this case did not affect any firefighter's seniority rights, and it did not involve layoffs. The loss of a job is obviously a more serious detriment to an employee than the delay in an opportunity to establish eligibility for a promotion.

The Court of Appeals' assessment with respect to detriment is correct. *See Sheet Metal Workers* v. *E.E.O.C.*, ____ U.S. ____, 106 S.Ct. 3019, 3059 (1986) (Powell, J., concurring in part and in the judgment) (layoffs at issue in *Wygant*, *supra*, demanded closer scrutiny than hiring goals).

Finally, the District Court's order enforcing the 1974 decree is not invalid on the grounds that the beneficiaries of that order were not identified as actual victims of discrimination. Voluntarily-adopted remedies are per-

mitted under the Equal Protection Clause if they are based on sufficiently weighty government interests and are narrowly tailored to achieve their goals. *Wygant, supra*, 106 S.Ct. at 1846. *See Sheet Metal Workers* v. *E.E.O.C.*, ____ U.S. ____, 106 S.Ct. 3019 (1986) and *Firefighters Local No. 93* v. *City of Cleveland*, ____ U.S. ____, 106 S.Ct. 3063 (1986) (courts may, in appropriate cases, provide relief under Title VII that benefits individuals who were not the actual victims of a defendant's discriminatory practices).

The plan adopted by the District Court is narrowly tailored in its purpose, and minimally intrusive to the interests of nonminority firefighters. As the Court of Appeals held regarding the short delay in promotional possibilities resulting from the Compliance order: "[t]his is not too great a burden to impose upon the nonminority candidates in view of a long history of virtual exclusion of black firefighters from the promoted ranks." 804 F.2d at 365 (Pet. App. A, p. 12a).

CONCLUSION

The decisions of the lower Courts are supported fully by the reasoning of the majority of this Court in the judgment in *United States* v. *Paradise*, announced on February 25, 1987.

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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